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IN THE

Supreme Court of the United States

October Term, 1990

SUSAN BRANDT, *et al.*,

Petitioners,

vs.

CHALKBOARD, INC.; KAREN M. HOYT,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Amici Curiae Brief of the States of Alabama, Arkansas, Connecticut, Florida, Hawaii, Idaho, Kentucky, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, South Dakota, Utah, Vermont, Washington, Wyoming, and the Commonwealth of Puerto Rico, The Virgin Islands, and American Samoa as Amici Curiae in Support of Petitioners

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INTEREST OF AMICI

At issue here is the correctness of the Ninth Circuit Court of Appeals' decision denying qualified immunity to Arizona officials. Because the court premised its decision on the finding that officials had followed the wrong state law in suspending a license to operate a day care center, it has introduced a rule of law that was explicitly rejected by this Court in Davis v. Scherer, 468 U.S. 182 (1984). If left undisturbed, not only will the states in the Ninth Circuit be subjected to this discredited rule, but states in other circuits are faced with the potential that Courts of Appeals, may, in their discretion, choose to disregard controlling precedents of this Court, particularly those regarding qualified immunity.

Additionally, the amici states are dismayed at the short shrift given the states' important interest in protecting young children from abuse. The Ninth Circuit's reasoning, which elevates the interests of a business licensee above the vital interest of public health, safety and welfare, creates a dangerous precedent that denigrates this crucial state interest. Its insistence that state officials' decisions regarding public "emergencies" be subjected to an after-the-fact federal court scrutiny on pain of individual monetary liability cannot be reconciled with controlling authority on qualified immunity. Such a result can only inhibit state officials in carrying out their responsibilities under the law and seriously jeopardize public protection.

SUMMARY OF ARGUMENT

In its decision the court of appeals rejected the defense of qualified immunity because Arizona officials failed to follow the appropriate state statute when they took action against a day care center whose employees, the officials believed, had abused children in their care. The officials had decided to follow an administrative law providing for the emergency suspension of a license rather than another that authorized an action for injunctive relief. No Arizona decision had held that such action was impermissible. The decision of the court of appeals squarely conflicts with Davis v. Scherer, 468 U.S. 183 (1984), holding that officials do not lose their qualified immunity merely because they violated a state law.

The decision also conflicts with *Mathews v. Eldridge*, 424 U.S. 319 (1976), because the court of appeals weighed the *Mathews* factors not simply to decide what process was due the day care center but also to arrive at its interpretation of "clearly established law." *Mathews* was not intended for this purpose. Moreover, in conflict with *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), the court decided that qualified immunity will not protect those officials who should have known their conduct was unlawful. Under *Harlow* and many other decisions of this Court, qualified immunity is not lost because an official "should have known" his conduct was unlawful. It is lost only if clearly established law proscribed the action taken.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISION IN *DAVIS V. SCHERER*.

Due process, this Court has frequently emphasized, "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976). Rather, it "is flexible and calls for such procedural protections as the situation demands." *Id.*; *see also, Zinermon v. Burch*, ___ U.S. ___, 110 S.Ct. 975, 984 (1990). For this very reason, the process due an individual, particularly when the state must act in a perceived emergency, is not always clearly apparent. It may be that in retrospect, and applying the intricate balancing tests of *Mathews, supra*, a court will find that a state official's action violated an individual's rights under the Fourteenth Amendment. But such a finding does not decide the issue of entitlement to damages, for

> [e]ven defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard.

Davis v. Scherer, 468 U.S. 183, 190 (1984).

In *Davis v. Scherer*, this Court unequivocally rejected the contention that official conduct in violation of state laws or regulations controlled the due process analysis:

> Officials sued for constitutional violations do not lose their qualified immunity merely because their conduct violates some statutory or administrative provision.

Id. at 194.

The *Davis* case and *Chalkboard, Inc. v. Brandt,* 902 F.2d 1375 (9th Cir. 1989), are virtually identical. Both presented procedural due process challenges to state officials' conduct and both sought monetary damages from state officials. In each case state laws would have provided an opportunity to be heard prior to the deprivation (of employment in *Davis* and a business license in *Chalkboard*). State officials raised the defense of qualified immunity in each case. Thus, *stare decisis* would ordinarily require that the Arizona officials in *Chalkboard* be accorded qualified immunity. Instead, however, the state officials were found subject to liability for failing to follow the correct state law.

The reasons underlying the decision in *Davis v. Scherer*, are of immense importance to the states, for they go to the heart of effective governance. A contrary rule, the Court recognized, "would disrupt the balance that our cases strike between the interests in vindication of citizen's constitutional rights and in public official's effective performance of their duties." 468 U.S. at 195. To accept that any given state statute can define a clearly established constitutional right, perhaps one not otherwise foreshadowed by federal case law, may well require federal courts to decipher the "meaning or purpose" of state laws or regulations, "questions that federal judges often may be unable to resolve on summary judgment." *Id. Davis v. Scherer* clearly prohibited such forays into the thickets of state law. To allow such inquiry into questions of state law would effectively nullify the command that qualified immunity be decided on motion for summary judgment. *See Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

There can be no doubt that the decision of the Ninth Circuit casts to the winds the reasoning of *Davis v. Scherer* and with it the immunity of state officials who were heretofore constrained only to look to clearly established federal law to guide the performance of their duties. As the court of appeals so plainly — and wrongly — stated in its analysis, "[t]he *key element* is that defendants failed to follow the emergency injunction procedures specified by the legislature, and instead effected the summary suspension themselves." *Chalkboard, Inc. v. Brandt*, 902 F.2d 1375, 1381 (9th Cir. 1989) (emphasis added).

Although the Arizona officials had followed another state statute that specifically applied to suspension of licenses, the court of appeals rejected the applicability of that statute even though no Arizona court had ruled on the question. Thus did the court of appeals rest its due process analysis on the "meaning and purpose" of various state statutes, in clear contravention of *Davis v. Scherer* (*see* 468 U.S. at 195):

> In our case . . . the defendants chose not to follow the procedure specified by the legislature. . . .
>
> * * * *
>
> [T]he state itself has specified the kind of emergency treatment required to safeguard the interests of its children. We are not entitled to second-guess that legislative determination [citation omitted] and neither are the defendants.
>
> * * * *
>
> In ignoring these procedures and summarily suspending Chalkboard's license without notice or opportunity to be heard, reasonable officials would have known their actions were not lawful.

Chalkboard, Inc. v. Brandt, 902 F.2d 1375, 1382 (9th Cir. 1989) (emphasis the court's).

The decision below cannot be reconciled with *Davis v. Scherer*. It is inconsistent with the states' settled expectations and the Court's many recent decisions on qualified immunity. But more than consistency is at stake here. The Ninth Circuit's decision, by introducing state law analysis into the due process equation, greatly expands the states' potential for liability. At the very least, it means that lawsuits will be more protracted because they are less amenable to summary judgment when uncertain issues of state law must be explored and resolved. The end result is that in many circumstances state officials will be as much concerned about "harassing litigation," *see Davis v. Scherer*, 468 U.S. 195, as they are about effectively performing their duties. No one benefits, least of all the public, when the chief concern of an official is to avoid making mistakes and to invariably follow the path of least resistance.

II. THE COURT OF APPEAL'S REJECTION OF THE QUALIFIED IMMUNITY DEFENSE MISAPPLIES *MATHEWS V. ELDRIDGE* AND FAILS TO MEET THE OBJECTIVE LEGAL REASONABLENESS STANDARD OF *HARLOW V. FITZGERALD* AND OTHER CASES.

In its effort to decide whether clearly established law foreclosed the qualified immunity defense, the court of appeals misapplied *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *Mathews* provides for weighing the relative interests of the individual and the government in deciding what process is due under the Constitution. *See Zinermon v. Burch*, ___ U.S. ___, 110 S.Ct. 975, 984 (1990); *Ingraham v.*

Wright, 430 U.S. 651, 675 (1977).[1] It does not, however, set forth any formula for determining whether the right to such process has been clearly established.

The analysis of the court of appeals strongly implies that where the weighing of the *Mathews* factors might suggest particular procedural protections, a reasonable official is bound to accept that result as clearly established law, even where there are recent precedents to the contrary.[2] The court of appeals mistakenly applied the *Mathews* analysis to answer the ultimate issue in this case: "Whether the administrative process employed by defendants . . . was *clearly* deficient." 902 F.2d 1380 (emphasis the court's). It concluded that *under the Mathews analysis*, Chalkboard was entitled to a hearing before suspension of its license *and* that reasonable officials would have known this. *Id.* at 1382.

Mathews has never been used by this Court or, so far as can be determined, by any other federal court of appeals as a *formula* to determine whether requisite procedural protections are clearly established law. If such protections are "clearly established," as that term has been used in qualified immunity cases, a complex *Mathews* analysis would be wholly unnecessary. The Ninth Circuit's use of *Mathews* in

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1. The factors to be weighed are:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

2 The court of appeals did not even discuss two cases that clearly support the course of action taken by Arizona officials, *Rice v. Virgil*, 642 F.Supp. 212 (D.N.M. 1986), *aff'd* 854 F.2d 1323 (10th Cir. 1989), and *Dieter v. State Dep't of Social Services*, 228 Neb. 368, 422 N.W.2d 560 (1988).

this fashion cannot be reconciled with the many decisions of this Court on qualified immunity.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court established the principle that officials are protected by qualified immunity if their actions meet the standard of "objective legal reasonableness." It has said subsequently that the defense protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 344-345 (1986). Officials are immune unless "the law clearly proscribed the actions" they took. *Mitchell v. Forsyth*, 472 U.S. 511, 528 (1985). That is, "in the light of preexisting law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The court of appeals clearly misapplied these principles. Using the *Mathews* analysis, the court concluded that a hearing was required before Chalkboard's license could be suspended, relying on both state statutory law and this Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). As shown, reliance on state law plainly violates *Davis v. Scherer, supra*, and the decision attaches no significance whatsoever to the fact that Arizona courts had never decided that the two apparently applicable Arizona statutes were mutually exclusive. Moreover, *Loudermill* involved the discharge of an employee without a prior hearing, not the suspension of a license. The circumstances are not fully analogous, and the decision below cites no case so holding. In fact, *Loudermill* itself notes that "where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay." 470 U.S. at 544-545. The Arizona officials, however, had no comparable alternative for protecting the children at the day care center.

The attitude of the Ninth Circuit toward the protection of children is particularly distressing, minimizing as it does

the importance of their welfare. Millions of young children are now entrusted to the day care centers that have proliferated across the nation in the past two decades. The regulation and control of these businesses is of vital interest to the states. Given the tender age of the children committed to day care, the states must have the ability to protect them by acting quickly in cases of reported abuse. Whenever there is any doubt as to the underlying facts, the doubt must be resolved in favor of acting quickly. After all, the countervailing interest is only financial gain, which scarcely overrides the health, safety and welfare of young children. This important state interest, first enunciated by this Court in *Prince v. Massachusetts*, 321 U.S. 158 (1944), was given very little weight by the Ninth Circuit.

This year the Court has again acknowledged its reluctance to prescribe inflexible rules for situations in which the state must take quick action. In *Zinermon v. Burch*, ___ U.S. ___, 110 S.Ct. 975, 984 (1990), the Court stated that "[a]pplying [the *Mathews*] test, the Court *usually* has held that the Constitution requires some kind of hearing before the State deprives a person of liberty or property." (Emphasis added.) But, the Court acknowledged, that is not invariably so:

> In some circumstances, however, the Court has held that a statutory provision for a postdeprivation hearing, or a common-law tort remedy for erroneous deprivation, satisfies due process. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 436 (1982) (" 'the necessity of quick action by the State or the impracticality of providing any predeprivation process,' " may mean that a postdeprivation remedy is constitutionally adequate, quoting *Parratt*, 451 U.S. at 539); *Memphis Light*, 436 U.S. at 19 ("where the potential length or severity of the deprivation does not indicate a likelihood of serious loss and where the proce-

> dures . . . are sufficiently reliable to minimize the risk of erroneous determination," a prior hearing may not be required); *Ingraham v. Wright*, 430 U.S. 651, 682 (1977) (hearing not required before corporal punishment of junior high school students); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600, 619-620 (1974) (hearing not required before issuance of writ to sequester debtor's property).

Id. at 984-985.

Here, the Arizona officials reasonably believed that an emergency existed at the day care center and that conditions there threatened the health and safety of young children. There is no clearly established law holding that in such circumstances the day care center's license could not be suspended before a hearing was provided. *Loudermill*, on which the court of appeals relied so heavily, is hardly controlling authority, as this Court expressly stated therein that continued employment of the security guard pending a hearing posed no danger. 470 U.S. 545, n. 10. The same cannot be said of the day care operation here in question.

The decision of the court of appeals is clearly contrary to *Harlow*. "*Harlow* teaches that officials performing discretionary functions are not subject to suit when such questions are resolved against them only after they have acted." *Mitchell v. Forsyth*, 472 U.S. 511, 535 (1985). Using the *Mathews* analysis, the court of appeals resolved the novel question of what process was due after the officials acted and improperly held them subject to suit.

The decision below, intertwining as it does both state statutory law and employment law, seems clearly to stand for the proposition that qualified immunity is foreclosed if a court, applying the generalized *Mathews* factors, later finds that an official "should have known" that particular conduct was unlawful, regardless of whether any court had

so held. Indeed, this is how Justice Brennan seems to have interpreted Harlow, supra, 457 U.S. at 821 (Brennan, J., concurring), and it is the apparent rationale of the Ninth Circuit. But the Court's opinion in Harlow relied on the "objective reasonableness" of an official's conduct and explicitly immunized those whose acts violate no "clearly established" prohibitions. Id. at 818. Contrary to the result reached by the Ninth Circuit, this Court has said that only when the law is clearly established and the official pleads "extraordinary circumstances" will immunity turn on whether the official "can prove that he neither knew nor should have known of the relevant legal standard." Id. at 819.

Irrespective of whether the court of appeals was right in its determination of what process was due, it was wrong in deciding that reasonable officers "would have known" their emergency actions were unlawful and using that as the standard for clearly established law. The court's rejection of the qualified immunity defense, and its strained analytical approach, must give pause to all public officials. Few, at least in the Ninth Circuit, will be wont to act "with independence and without fear of consequences," *see Harlow, supra*, at 819 quoting *Pierson v. Ray*, 386 U.S. 547, 554 (1967), if the law is *not* clearly established. That result turns *Harlow* on its head.

CONCLUSION

For all the foregoing reasons, amici respectfully submit that the Court should either summarily reverse the decision below or grant the writ and set the case for argument on its merits.

Respectfully submitted,

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